

Japan's 'Scientific' Whaling Program and the Antarctic Treaty System Independent Panel of Legal and Policy Experts

Report of the Canberra Panel

12 January 2009

The Canberra Panel

The Canberra Panel comprises a group of Antarctic law and policy experts convened by the International Fund for Animal Welfare (IFAW) to provide an independent strategic assessment of the options available to Australia, New Zealand and other likeminded states to effect scrutiny of Japan's Antarctic whaling operations through the Antarctic Treaty System (ATS). The Canberra Panel has been asked to examine methodologies, timelines and mechanisms for placing the environmental risks of Japan's Antarctic whaling program on the agenda of future Antarctic Treaty Consultative Meetings (ATCM) and other ATS forums. The work of the Canberra Panel builds on previous work commissioned by IFAW, including the reports of the Paris, Sydney and London Panels, with the aim of challenging the legality of Japan's Antarctic whaling program. A précis of the conclusions, recommendations and composition of previous reports commissioned by IFAW is provided in Appendix 1 to this Report.

Panel Members

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Stuart Kaye was appointed to a Chair in Law at the University of Melbourne in 2006. Prior to that, he was the Dean of Law at the University of Wollongong from 2002 to 2006, and Head of School at James Cook University Law School from 2001-2002. Professor Kaye has a research interest in the law of the sea and international law generally, and has published extensively in these areas. He has written a number of books including *Australia's Maritime Boundaries* (2nd edn, 2001), *The Torres Strait* (1997), *Human Rights in International and Australian Law* (with R. Piotrowicz) (2001), and *International Fisheries Management* (2001). He was appointed by Australia to the International Hydrographic Organization's Panel of Experts on Maritime Boundary Delimitation in 1995 and in 2000 was appointed by Australia to the List of Arbitrators under the 1991 Madrid Protocol to the Antarctic Treaty. He was made a Fellow of the Royal Geographical Society in 2007. Professor Kaye is also a Commander in the Royal Australian Navy Reserve, principally providing advice on operations and international law. In 2005, he chaired a review of Australian maritime enforcement legislation on behalf of the then Joint Offshore Protection Command (now Border Protection Command).

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Executive Summary

Japan has now conducted ‘scientific’ whaling programs in Antarctic waters for twenty years, in purported reliance on the 1946 International Convention for the Regulation of Whaling (ICRW) which allows ‘special permit’ whaling in limited circumstances. However as Japan’s whaling is conducted in the Antarctic Treaty area¹ the Antarctic Treaty System (ATS)² also has application to an enterprise which Japan has expressly sought to justify as being concerned with Antarctic scientific research.³ While several provisions of the ATS, and current state practice, speak against the ATS having direct applicability to whaling, the ATS does supply important disciplines in relation to the ancillary environmental impacts of whaling in the highly sensitive Antarctic marine environment.

The central recommendation of the Canberra Panel is that the provisions of the 1991 Environmental Protocol to the Antarctic Treaty (Environmental Protocol) are relevant to these associated environmental impacts and can and should be invoked against Japan. Specifically the compliance provisions found in Article 13 oblige Japan to justify to other parties to the ATS that JARPA II does not have adverse impacts on the Antarctic environment, and also allow other parties concerned at such impacts to raise the issue for discussion in the Antarctic Treaty Consultative Meeting (ATCM). This will bring increased international attention to the substantial environmental risks connected with Japan’s Antarctic whaling programs, hazards that were clearly demonstrated by the explosion and fire onboard the whaling factory ship the *Nisshin Maru* in an ice-exposed area of the Ross Sea in 2007.

The primary objective in turning to the ATS is to make Japan more accountable for its conduct of JARPA II. This could impose additional safeguards for the Antarctic environment in relation to JARPA II in line with improvements achieved in relation to ship-borne tourism operations, which raise many similar environmental concerns. Over time, sustained pressure through the ATS is likely to increase further the difficulties faced by Japan in operating its whaling fleet in the Southern Ocean, and ultimately may contribute to the complete cessation of Japanese special permit whaling in Antarctica. Given the limited opportunities for success in achieving this outcome through the International Whaling Commission (IWC) this strategy has significant potential, even if it will take several years to realise.

¹ The area south of 60°S: Antarctic Treaty, Article VI.

² The ATS comprises several key treaties and other instruments regulating the Antarctic region, including the 1959 Antarctic Treaty, the 1972 Convention for the Conservation of Antarctic Seals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources and the 1991 Environmental Protocol on Environmental Protection to the Antarctic Treaty.

³ Japan’s special permit whaling programs in the Antarctic have as a stated objective the monitoring of the Antarctic ecosystem.

Factual Background – Japan’s Antarctic Whaling Programs

Japan ceased commercial whaling in the Southern Ocean at the end of the 1986/7 summer whaling season following the adoption by the IWC of a moratorium on commercial whaling (which came into force in 1985/6).⁴ The following year Japan began Antarctic scientific whaling programs that have continued to this day, purportedly in reliance on Article VIII of the ICRW.⁵ Although Japan has justified its Antarctic whaling programs in part on the basis of their value to Antarctic scientific research, Japan has not sought to bring its programs under the rubric of the Environmental Protocol which allows permits to be granted for “taking” (killing) or “harmful interference” with Antarctic fauna for scientific or other restricted purposes.⁶

JARPA

Japan’s initial special permit program, the “Japanese Whale Research Program under Special Permit in the Antarctic” (JARPA), commenced in the 1987/8 season, and continued until the 2004/05 season. The principal focus of JARPA was the taking of Antarctic minke whales with an initial catch of 300±10% each season. Following the 1995/6 season the size of the annual catch was increased to 400±10%.

Importantly, the stated objectives of JARPA included a reference to examining the role of whales in the Antarctic ecosystem. However, the scientific value of the JARPA has been repeatedly questioned. At the 59th Annual Meeting of the IWC in 2007 the IWC adopted Resolution 2007-1 which noted that “none of the goals of [JARPA] had been reached, and that the result of [JARPA] are not required for management under the Revised Management Procedure.”

Around 6,800 minke whales were taken during the 18 year period in which JARPA was conducted. For much of that period JARPA was carried out in the Southern Ocean Sanctuary that was declared by the IWC in 1994.⁷ Japan was the only member of the IWC to vote against the Southern Ocean Sanctuary, and has lodged an objection to the Sanctuary with respect to minke whales. A resolution proposed by Japan at the 56th Annual Meeting of the IWC in 2004 to remove the Southern Ocean Sanctuary was unsuccessful.

JARPA II

In 2005 Japan announced the “Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic” (JARPA II).⁸ The 2005/6 and 2006/7 seasons were devoted to a

⁴ Schedule to the ICRW, [10(e)]. In 1985 Japan withdrew its initial objection to the moratorium.

⁵ ICRW, Article VII(1) provides that a party may “grant to any of its nationals a special permit authorizing that national to kill, take and treat whales for the purposes of scientific research”.

⁶ Environmental Protocol, Annex II, Article 3. See the discussion of this provision by Allsop J in *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510, [45]-[51].

⁷ Schedule to the ICRW, [7(b)].

⁸ Government of Japan, Plan for the Second Phase of the Japanese Whale Research Program under Special Permit in the Antarctic (JARPA II) Monitoring of the Antarctic Ecosystem and Development of New Management Objectives for Whale Resources (<http://www.icrwale.org/eng/SC5701.pdf>).

feasibility study, with the full-scale program to commence from the 2007/08 season, and continue for a further three seasons. In JARPA II the “monitoring of the Antarctic ecosystem” was elevated to be the first of the program’s four stated objectives. Emphasising the broad purpose of the program in examining the Antarctic ecosystem, the overview of JARPA II presented by Japan to the IWC Scientific Committee at the 57th Annual Meeting of the IWC in 2005 noted that JARPA II was “expected to be a long-term research program focussed on Antarctic minke, humpback and fin whales, crabeater seals, and possibly other species in the Antarctic ecosystem that are major predators of Antarctic krill.”⁹ We would note that for Contracting Parties to 1972 Convention for the Conservation of Antarctic Seals, such as Japan, Special Permits are required to kill or capture seals.¹⁰ In the most recent report of the Depository for the Convention, covering the period 1 March 2006 to 28 February 2007, Japan has reported no take of seals.¹¹ Presumably any seals taken under JARPA II will be advised to the Depository and reported at future ATCMs.

The two-year JARPA II feasibility study was to involve the taking of 850±10% minke whales and 10 fin whales, over double the number of animals taken annually under JARPA. Actual catches as reported by Japan to the IWC were 856 minke whales and 10 fin whales for the 2005/6 season and 508 minke whales and 3 fin whales for the 2006/7 season. JARPA II was interrupted in 2006/7 as a result of a major fire on the factory ship, the *Nisshin Maru*, ignited by an onboard explosion on 15 February 2007. This incident is addressed in more detail below.

The full-scale JARPA II commenced in the 2007/8 season. Initially projected catches were 850±10% Antarctic minke whales, 50 fin whales, and 50 humpback whales. However actual catches were much lower; 551 minke whales and no fin whales were taken,¹² and there were no catches of humpbacks following the suspension of the humpback quota in December 2007 (a suspension that appears likely to remain in place in 2008/9). The reduced catch of minke and fin whales was due largely to the interruption of the hunt by vessels from Greenpeace International and the Sea Shepherd Conservation Society,¹³ and possibly also the result of monitoring of the Japanese fleet by the Australian customs vessel, the *Oceanic Viking*, which was deployed by the Australian Government to collect evidence for the purpose of potential international legal action against Japan.¹⁴ We note that in recent years there have been dangerous maritime incidents between the JARPA II fleet and non-governmental protest vessels including the M/V *Farley Mowatt* and M/V *Steve Irwin* operated by the Sea Shepherd Conservation Society. On 15 January 2008 two crew members of the M/V *Steve Irwin* boarded the *Yushin Maru II* where they were detained until 17 January 2008 and then transferred to the *Oceanic Viking*.

⁹ Ibid, p. 5.

¹⁰ Article 4.

¹¹ Final Report of the 31st Antarctic Treaty Consultative Meeting, 2008.

¹² Report of the Scientific Committee to the 60th Annual Meeting of the IWC, June 2008, p. 68 (http://www.iwcoffice.org/documents/sci_com/SCRepfiles2008/SCReportFINAL.pdf).

¹³ Report of the Scientific Committee to the 60th Annual Meeting of the IWC, above n 12, 66.

¹⁴ The Hon Stephen Smith, “Completion of the Mission of the Oceanic Viking”, Media Release, 28 February 2008 (http://www.foreignminister.gov.au/releases/2008/fa-s039_08.html).

As with JARPA before it, the scientific basis of JARPA II has been challenged in the IWC. At the 57th Annual Meeting of the IWC in 2005 the IWC adopted Resolution 2005-1 which urged “the Government of Japan to withdraw its JARPA II proposal or to revise it so that any information needed to meet the stated objectives of the proposal is obtained using non-lethal methods.” At the 59th Annual Meeting of the IWC in 2007 the IWC adopted Resolution 2007-1 which included a statement calling upon “Government of Japan to suspend indefinitely the lethal aspects of JARPA II conducted within the Southern Ocean Whale Sanctuary.” No resolutions were adopted at the 60th Annual Meeting of the IWC in 2008 on JARPA II, or any other matter, in light of ongoing discussions on reform of the IWC.

JARPA II is conducted by a public company, Kyodo Senpaku Kaisha Ltd (Kyodo), under permits granted by the Japanese government. In recent seasons JARPA II has been carried out by a fleet of five Japanese-flagged vessels, comprising one sighting and survey vessel, three catcher vessels and a factory ship. A sixth vessel, the Panamanian-flagged *Oriental Bluebird*, has been used for resupply, refuelling and transshipment of whale meat. In October 2008 the *Oriental Bluebird* was deregistered following a ruling in a Panamanian court that the owners, Hiyo Shipping Co Ltd, had violated domestic and international shipping regulations relating to permissible use, maritime safety, and marine environmental protection. Specifically it was found that by being used for the trans-shipment and transport of whale meat the owners had failed to comply with Panamanian law that requires all vessels flying its flag to comply with Panama’s whale protection policies.¹⁵

JARPA II activities have alternated between waters offshore those parts of Antarctica claimed by Australia (2007/8) and New Zealand (2006/7), and it is anticipated that in 2008/9 JARPA II will be predominantly conducted within the Ross Sea offshore the Ross Dependency. The Japanese authorities have indicated that they plan to take up to 935 minke whales and 50 fin whales in the 2008/9 season.

The Humane Society International Case

JARPA and JARPA II have been the subject of legal proceedings in the Federal Court of Australia brought by Humane Society International (HSI) against Kyodo.¹⁶

HSI alleged that Kyodo had committed offences under sections 229-230 of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) (*EPBC Act*) by killing and injuring whales within that part of the Australian Whale Sanctuary appurtenant to the Australian Antarctic

¹⁵ Gabriel Despaigne, “Las Ballenas Embisten al ‘Oriental Bluebird’” *La Prensa*, 4 December 2008 (<http://mensual.prensa.com/mensual/contenido/2008/12/04/hoy/opinion/1613421.html>).

¹⁶ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510 (decision of Allsop J that Federal Court had jurisdiction, and inviting submissions from the Attorney-General); [2005] FCA 664 (decision of Allsop J refusing leave to serve originating process); [2006] FCAFC 116 (decision of the Full Federal Court overturning Allsop J’s decision to refuse leave); [2007] FCA 124 (decision of Allsop J allowing substituted service of originating process); [2008] FCA 3 (decision of Allsop J declaring that Kyodo had contravened the *Environment Protection and Biodiversity Act* 1999 (Cth)); [2008] FCA 36 (decision of Rares J allowing substituted service of orders made by Allsop J).

Territory. HSI was ultimately successful in its application after the Full Federal Court¹⁷ overturned a decision by Allsop J¹⁸ refusing to grant leave to serve originating process on the respondent in Japan. On 15 January 2008 Allsop J held that Kyodo had contravened the relevant provisions of the *EPBC Act* and made orders that Kyodo be restrained from taking further whales from the Australian Whale Sanctuary unless permitted or authorised to do so.¹⁹ The Canberra Panel notes that in the initial judgment in the case, in which Allsop J found that the Court possessed jurisdiction and there was a *prima facie* case, a number of important observations were made concerning the interrelationship between the ATS and the ICRW.²⁰

At no time has Kyodo appeared in the Federal Court proceedings, and the Government of Japan has declined to assist in effecting service of originating process, or the 2008 orders of the Court, on the grounds that “this issue relates to waters and a matter over which Japan does not recognise Australia’s jurisdiction”.²¹ The Australian Government’s position is that the case should be allowed to proceed in the ordinary way without expressing a view as to the merits or otherwise of the litigation.²² There has been no indication that the Government has any intention of enforcing the orders of the court, a position that the Canberra Panel fully endorses in view of the inconsistency of any such action with the letter and spirit of the Antarctic Treaty, and the desirability of advancing a critical examination of JARPA II through multilateral forums.

Why Should the ATS Examine JARPA II?

Relationship with the ICRW

The threshold issue to be confronted in bringing the ATS to bear on JARPA II is the reluctance on the part of ATCPs to consider whaling activities. For a combination of legal and political reasons the prevailing view has been that whaling activities cannot or should not be examined by ATS rules and institutions, and instead should be deferred to the ICRW.

This understanding is based on a provision of the Antarctic Treaty, to which the Environmental Protocol and other ATS instruments is subject, which states that it does not prejudice the rights or exercise of rights under international law with regards to the high seas in the Antarctic Treaty area.²³ On one view the Environmental Protocol could not therefore be used to prevent the exercise of the high seas freedoms including the freedom to take whales and to conduct marine scientific research as accorded by the law of the sea, and regulated by the ICRW. Seeking to confirm this exemption, the parties to the Environmental Protocol indicated at the time the treaty was concluded that it was not to derogate from rights and obligations under the ICRW.²⁴

¹⁷ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2006] FCAFC 116.

¹⁸ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2005] FCA 664.

¹⁹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3.

²⁰ See *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510, [37]-[62].

²¹ *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 3, [20].

²² *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2008] FCA 36, [4].

²³ Antarctic Treaty, Article VI.

²⁴ Final Act of the 11th Antarctic Treaty Special Consultative Meeting (1991) 50 ILM 1460, [7]. This statement sought to clarify Article 4(2) of the Environmental Protocol which provides that “[n]othing in this Protocol shall

When it comes to the core activity of whaling it is therefore unlikely that the ATS would examine the issue unless it were clearly established in an international forum that JARPA II amounted to such a serious breach of the ICRW that it was not whaling in exercise of rights under the ICRW preserved by the ATS.

The position is different when it comes to the associated environmental impacts of Japan's Antarctic whaling programs. JARPA II's environmental impacts in the Southern Ocean neither start nor end with the taking of whales. Rather they encompass the full range of actual and potential impacts that the conduct of JARPA II may have on the broader Antarctic environment in terms of pollution from the ordinary operation of the Japanese-flagged whaling fleet and support vessels flagged to other states, and the risks that accidents during these operations may cause significant damage to the sensitive Antarctic environment.

The fire on board the *Nisshin Maru* in 2007 demonstrated that the issues of marine safety and environmental protection in relation to whaling are of essentially the same seriousness as those connected with ship-borne tourism in the Antarctic Treaty area. A series of incidents involving tourist vessels has led to extensive examination within ATCMs and other ATS forums of the safety and environmental issues surrounding this activity,²⁵ and efforts have been made to improve the safety of tourism operations. The same cannot be said for JARPA II in relation to which there has been no serious effort to date to increase the level of scrutiny and accountability.

This difference in treatment is to some extent understandable because the whaling issue invokes significant controversy. However, there is no legal reason why the ancillary or generic environmental impacts of whaling expeditions cannot be considered within the ATS. And the political reticence of the ATS may be overcome incrementally over time if an ATCP, or preferably a coalition of likeminded ATCPs, seeks to shift the attention of ATS forums to a truly comprehensive examination of the Antarctic environment, consistent with the objectives and principles of the Environmental Protocol and CCAMLR.

Indeed oversight under the Environmental Protocol of ancillary environmental matters is critical because of the limitations of the ICRW and the International Maritime Organization (IMO) in dealing with these issues.

Under the ICRW regulations can be made and incorporated in the Schedule to deal with topics such as species of whale to be protected, open and closed seasons, the establishment of sanctuaries, and gear type and catch records.²⁶ However, these regulations could not extend to minimising the environmental effects of whaling, such as by requiring parties to adopt specific safety or environmental standards for the operation of whaling vessels. The importance of the ATS in this context is further emphasised by the prospect, however small, of Japan renouncing

derogate from the rights and obligations of the Parties to the Protocol under the other international instruments in force within the Antarctic Treaty system.”

²⁵ See the Final Report of the 31st Antarctic Treaty Consultative Meeting, 2008, [55], [220]-[234].

²⁶ ICRW, Article V(1).

the ICRW and leaving the IWC.

In relation to the IMO, some progress has been made on issues of Antarctic shipping safety, with the 57th Session of the Marine Environment Protection Committee (MEPC) noting the seriousness of the problem, suggestions made to address it through improved standards such as vessel traffic monitoring, and inviting relevant proposals from members to future meetings of the MEPC. The IMO is also considering extending its 2002 Guidelines for Ships Operating in Arctic Waters²⁷ to cover ships operating in the Antarctic.²⁸ However the focus of the IMO in the Antarctic context has been on the safety of tourist rather than whaling or fishing vessels (or indeed, vessels supporting national Antarctic programmes). Moreover it has been emphasised by ATCPs that the ATCM should retain the “policy lead” for addressing activities impacting on Antarctica while working collaboratively with IMO.²⁹

Advantages of the ATS over Other Options

The Canberra Panel recommends turning to the ATS for the reason that JARPA II is a distinctively Antarctic activity which is undermining the achievement of the objectives of the ATS instruments.

First and foremost the Canberra Panel notes the environmental risks connected with JARPA II which are not being assessed, managed or minimised by Japan consistent with its obligations under the Environmental Protocol. More broadly the conduct of JARPA II, especially in recent years, has become an increasing cause of tension and conflict with the spirit of international cooperation at the heart of the ATS. This is seen in the differences of opinion between ATCPs over the issue and the violent and hazardous confrontation between JARPA II vessels and the Sea Shepherd Conservation Society in the Antarctic Treaty area. This escalating situation is fundamentally at odds with the objective of the Antarctic Treaty that “Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord.”³⁰

Utilising the ATS also has advantages for Australia and New Zealand over other options because it allows JARPA II to be contested multilaterally rather than unilaterally, and in a way that does not turn on the legitimacy or otherwise of Australia and New Zealand’s sovereign claims to Antarctic territory, claims which are not recognised by Japan or most other states, including (critically in this context) states which may share Australian and New Zealand concerns about JARPA II. Action in the ATS is clearly preferable to proceeding down the route of enforcement of any national laws extended to the Antarctic, such as the *EPBC Act* (Cth), which not only raise the sovereignty question but would also be contrary to provisions of the ATS which forbid the

²⁷ MO Marine Safety Committee Circular 1056.

²⁸ Øystein Jensen, “Arctic Shipping Guidelines: Towards a Legal Regime for Navigation Safety and Environmental Protection?” (2008) 44 *Polar Record* 107, 113.

²⁹ Final Report of the 31st Antarctic Treaty Consultative Meeting, 2008, [55].

³⁰ Antarctic Treaty, Preamble, 2nd Recital.

exercise of jurisdiction over non-nationals.³¹ Utilising the ATS can also ensure that all possible options are exhausted before considering the invocation of compulsory arbitration under the Environmental Protocol.³² We would note further that the use of arbitration under the Environmental Protocol could in no way raise sovereignty problems, as the arbitral tribunal would be prevented by the treaty from deciding or ruling upon these issues.³³

Options under the ATS

Having addressed the scope of the ATS, what then are the options under the ATS? The Sydney Panel Report explored several options for challenging JARPA II in international law including under two ATS instruments, the Convention on the Conservation of Antarctic Marine Living Resources (CCAMLR) and the Environmental Protocol.

In relation to CCAMLR the Canberra Panel endorses the recommendations of the Sydney Panel that the CCAMLR Commission could consider the direct and indirect impacts of whaling on the Antarctic marine ecosystem, but does not press the recommendations at this time given the strict quarantining of whaling and maritime safety issues from the purview of the CCAMLR Commission.³⁴ In relation to the Environmental Protocol, the Canberra Panel considers that the options are substantially more promising, and in the discussion which follows we seek to develop the conclusions of the Sydney Panel on the Environmental Protocol in their broader policy context, and thereby offer a way forward in terms of the practicalities of raising these issues with Japan, with other ATCPs, and ultimately in the ATCM.

How Can the Environmental Protocol Examine JARPA II?

The Environmental Protocol establishes a comprehensive framework for the protection of the environment in the Antarctic Treaty area, that is the area south of 60°S. The Environmental Protocol designated Antarctica as a natural reserve, devoted to science and peace, and committed the parties to comprehensive protection of the Antarctic environment and its dependent and associated ecosystems.³⁵ Australia, New Zealand and Japan are all parties to the Environmental Protocol, which entered into force in 1998.³⁶

Environmental Risks Associated with JARPA II

The conduct of JARPA II raises significant maritime safety and environmental protection issues which have to date received insufficient attention in ATS forums. JARPA II generates significant marine pollution as a result of the discarding of several thousand tonnes of whale offal and other

³¹ See, eg, Antarctic Treaty, Article VIII.

³² Environmental Protocol, Articles 18-20.

³³ Environmental Protocol, Article 20(2).

³⁴ See in particular CCAMLR, Article VI.

³⁵ Environmental Protocol, Article 2.

³⁶ The Environmental Protocol and Annexes I to IV entered into force on 14 January 1998. Annex V entered into force on 24 May 2002. Annex VI is yet to enter into force.

wastes incidental to the whaling activities.³⁷ It also carries significant environmental risks as JARPA II is one of the most sizeable maritime operations in the Antarctic, conducted through a large and diverse fleet of vessels, not all of which are of ice class. In 2008/9 the fleet may comprise up to seven vessels, including sighter, catcher, factory and resupply vessels. Further accentuating the risk of incident, the Japanese fleet may once again be confronted by the Sea Shepherd Conservation Society.

JARPA II vessels operate in challenging sea and ice conditions in the most sensitive of marine environments, right up to the ice edge of Antarctica and in the vicinity of several Antarctic Specially Protected Areas. In these remote areas the capacity for responding to safety or pollution incidents is highly constrained. Limited air and sea assets can be deployed, and there are major delays in assistance reaching stricken vessels. In short, JARPA II raises serious hazards and risks that can be reduced through comprehensive contingency planning, but which cannot be entirely eliminated except with the complete cessation of whaling operations.

The environmental risks associated with JARPA II were clearly highlighted by the incident in 2007 involving the *Nisshin Maru* factory ship. On 15 February 2007 a major explosion aboard the *Nisshin Maru* killed a member of the crew and ignited a fire that disabled the vessel for 10 days. At the time of the incident, and until its engines were repaired and restarted, the vessel was located in an ice-exposed area of the Ross Sea around 200 nautical miles from Cape Adare, an Antarctic Specially Protected Area. As the vessel was within the New Zealand Search and Rescue Region the New Zealand Government responded to the “Mayday” message and facilitated the provision of assistance to the vessel.

Japan declined to report on the *Nisshin Maru* incident at the 30th or 31st ATCMs and it is difficult to ascertain the full extent of the environmental hazard that the incident posed to the Antarctic environment. However from available reports, including the information paper submitted by New Zealand to the 30th ATCM,³⁸ the incident emerges as one of the most serious emergencies ever to have occurred in Antarctica, and could have resulted in the spillage of chemicals and some or all of the 1,000 tonnes of heavy fuel oil onboard the vessel.³⁹

There are also concerns at the way in which the master of the vessel and the Japanese authorities responded to the incident at the time of the events and subsequently. Requests by the New Zealand government to remove the vessel from the Antarctic Treaty area were refused, despite the availability of assistance from the Greenpeace vessel, the *Esperanza*, a Russian-built tug equipped for deep-sea towing. And not only has Japan not subsequently explained the *Nisshin Maru* incident at the ATCM, but it has sought to close down discussion of the matter. In

³⁷ An estimate of this waste can be made from available data on the number of whales killed less production of whale meat on board the *Nisshin Maru*.

³⁸ New Zealand. ‘Fire on board the Japanese Whaling Vessel *Nisshin Maru*’. 30th Antarctic Treaty Consultative Meeting Information Paper 40, 2007.

³⁹ “New Zealand Demands Japan Urgently Move its Stricken Whaler from Antarctic Coast” *International Herald Tribune*, 22 February 2007.

response to New Zealand's information paper on the incident to the 30th ATCM the United Kingdom requested that Japan report at the 31st ATCM on the results of the maritime inquiry being conducted by Japan.⁴⁰ Japan refused to respond to this request on the grounds that "further discussion of the incident might lead to discussion on the whaling issue, on which the Parties had differing views."⁴¹ New Zealand expressed the view that it had no intention of raising whaling activities in the ATCM, but was concerned that the "ATCM be able to address serious maritime incidents that occur in the Antarctic Treaty area."⁴²

The response to the *Nisshin Maru* may be contrasted with that to maritime incidents involving tourist vessels. Incidents on tourist vessels in 2006 and 2007 have included the sinking of the *M/S Explorer*, the grounding of the cruise ships the *M/V Lybov Orlova* and *M/V Nordkapp* and the loss of power on another cruise ship, the *M/S Fram*, which resulted in the vessel drifting onto an iceberg. These incidents were discussed in ATS forums including working groups and plenary sessions at the 31th ATCM,⁴³ at which the parties adopted Resolution 6 (2008) to address the "risk of a serious humanitarian and environmental maritime incident" through better search and rescue coordination and the adoption by tourist vessels of enhancing contingency planning for remote operations.⁴⁴ The issue of shipping safety is certain to attract further attention at the 32nd ATCM given the grounding of the tourist cruise vessel *MV Ushuaia* on 4 December 2008 near Cape Anna in the northwest Antarctic Peninsula. This most recent incident in good weather involving an experienced crew, visiting a well-known area, with a vessel that had been operating around the Peninsula for several years, highlights the inherent risks of all Antarctic shipping operations.

In relation to the *M/S Explorer* many parties expressed concern at the 31st ATCM that the flag state, Liberia, was not present to address the incident, and noted that this highlighted the problem of vessels flagged to non parties to the ATS operating in the Antarctic Treaty area.⁴⁵ We would observe in this context that Japan has used vessels flagged to non-parties the ATS such as the Panamanian-flagged *Oriental Bluebird* resupply vessel which raises substantial concerns as to the accountability to ATS parties for an environmental emergency in the Antarctic Treaty area. Secondly, even in relation to *Nisshin Maru*, which was flagged to Japan, an ATS party, the ATS was in the same position as it was with non-party Liberia.

The risks of JARPA II are likely to come into ever sharper relief over time as the parties consider the development of a representative network of protected areas in the Southern Ocean,⁴⁶ which if they include areas targeted for JARPA II will inevitably bring greater attention to the environmental impacts of these activities in sensitive marine environments.

⁴⁰ Final Report of the 30th Antarctic Treaty Consultative Meeting, 2007, [228].

⁴¹ Final Report of the 30th Antarctic Treaty Consultative Meeting, 2007, [229].

⁴² Final Report of the 30th Antarctic Treaty Consultative Meeting, 2007, [230].

⁴³ See in particular Final Report of the 31st Antarctic Treaty Consultative Meeting, 2007, [141]-[146].

⁴⁴ Final Report of the 31st Antarctic Treaty Consultative Meeting, 2008, Annex C.

⁴⁵ Final Report of the 31st Antarctic Treaty Consultative Meeting, 2008, [142].

⁴⁶ See Report of the Committee for Environmental Protection (CEP XI), June 2008, [253]-[259].

Addressing JARPA II Environmental Risks Under the Environmental Protocol

It has been noted that while the Environmental Protocol may not apply to whaling itself it *does* apply to the incidental environmental effects of whaling. However, this is not the end of the matter as the Environmental Protocol suggests a distinction between activities for which advance notification is required and to which full obligations of environmental impact assessment apply, and other activities which attract a lesser, but still important, range of environmental duties.

The relevant provisions of the Antarctic Treaty and the Environmental Protocol are not entirely clear in drawing a distinction between activities requiring advance notification and those which do not,⁴⁷ and on one view Japan should be filing advance notifications for its JARPA II expeditions in conformity with the Antarctic Treaty. However, we note that the practice of the parties has generally been against the giving of notice or the conduct of environmental impact assessments for fishing or whaling activities.⁴⁸ There appear only to be two exceptions. New Zealand undertook an EIA for fishing activities in the Ross Sea in the late 1990s pursuant to its domestic legislation implementing the Environmental Protocol,⁴⁹ and similarly the IWC Secretariat sought to comply with the same legislation in 2001 in submitting an EIA to New Zealand in relation to a non-lethal whale scientific research program.⁵⁰

The Sydney Panel concluded that JARPA II can and should be subject to EIA, and we endorse that conclusion particularly as it applies to the associated environmental impacts of whaling operations. We acknowledge the significant practical difficulties that would be encountered if any effort was made to encourage Japan to give notification of JARPA II activities under the ATS and to conduct an EIA. However, when it comes to support vessels such as the *Oriental Bluebird* which have been used for refuelling, transshipment and supply and not whaling as such, there is a clear obligation to provide advance notification, and to conduct an EIA. Japan has not met this requirement, as it has not filed Advance Notifications for the *Oriental Bluebird* or other support vessels.

In any event there are important obligations under the Environmental Protocol that apply unequivocally to the general environmental risks associated with the conduct of JARPA II. The overarching requirement is that the protection of the Antarctic environment and dependent and associated ecosystems be a fundamental consideration in the planning and conduct of all

⁴⁷ See Antarctic Treaty, Article VII(5) and Environmental Protocol, Article 3(4)

⁴⁸ See Alan Hemmings, Karen Scott and Michelle Rogan-Finnemore, "Broadening the Duty in Relation to Environmental Impact Assessment Across the Legal Instruments Applying in Antarctica", Paper Presented at the 15th Annual Conference of the Australian and New Zealand Society of International Law, June 2007 (<http://law.anu.edu.au/CIPL/Conferences&SawerLecture/2007/ANZSIL%202007/Publications/Hemmings,%20Scott%20&%20Rogan-Finnemore%20-%20ANZSIL%2015%20-%202007%20-%20Bro%85.pdf>). See also Michael Johnson, "A Hole the Size of a Fishing Vessel in Antarctic Environmental Protection", Paper Presented at the 15th Annual Conference of the Australian and New Zealand Society of International Law, June 2007 (http://law.anu.edu.au/CIPL/Conferences&SawerLecture/2007/ANZSIL%202007/Publications/ANZSIL%20paper%20-%20Final_M%20Johnson.pdf).

⁴⁹ *Antarctica (Environmental Protection) Act* 1994 (NZ).

⁵⁰ Hemmings, Scott and Rogan-Finnemore, above n 40.

activities in the Antarctic Treaty area.⁵¹ There are specific duties that apply to give effect to this requirement, such as the duty to plan and conduct activities so as to limit adverse impacts on the Antarctic environment and the ecosystems it supports,⁵² and to avoid significant adverse effects on water quality.⁵³ Activities in the Antarctic Treaty area must also be planned and conducted on the basis of information sufficient to allow prior assessments and informed judgments on the possible impacts on the Antarctic environment and associated and dependent ecosystems, and such judgments are to take account of matters including whether procedures are available to provide for environmentally safe operations, and whether there exists the capacity to respond promptly and effectively to accidents, particularly those with potential environmental effects.⁵⁴

In light of the scale of JARPA and JARPA II, and the *Nisshin Maru* incident, it is strongly arguable that Japan has not met these obligations. We believe that a strategy for raising these matters is presented by the compliance provisions of the Environmental Protocol contained in Article 13. This process is enlivened in two ways. First, Japan is obliged to take appropriate steps to ensure that it adheres with the Protocol, and is required to notify all other parties of the steps that it takes to do so.⁵⁵ This imposes a positive requirement on Japan to justify to the parties that JARPA II is not having, and is not likely to have, any adverse effect on the Antarctic environment. To this end Japan should advise parties of its whaling plans and identify the steps that have been taken to minimise their environmental impacts. Such matters should be included in Japan's annual report on the steps taken to implement the Environmental Protocol that is circulated to all parties and is made publicly available.⁵⁶ Failure to address these procedural and substantial obligations is a trigger that could ultimately be used to justify the invocation of compulsory arbitration by concerned ATCPs.⁵⁷

Second, each party is required to draw the attention of all other parties to any activity which in its opinion affects the implementation of the objectives and principles of the Environmental Protocol.⁵⁸ This not only allows but positively mandates parties concerned at the associated environmental impacts of whaling to raise these matters directly with Japan and through ATS institutions, principally the CEP and the ATCM. Specific concerns which Australia, New Zealand and other states could draw to the attention of Japan and other ATCPs would include:

- Compliance by the JARPA II fleet with best practice marine environmental pollution standards applicable to vessels operating in the Southern Ocean, including the use of ice-strengthened and/or double-hull vessels and the use lighter grades of diesel fuel rather than more environmentally damaging heavy grade fuel oils;

⁵¹ Environmental Protocol, Article 3(1).

⁵² Environmental Protocol, Article 3(2)(a).

⁵³ Environmental Protocol, Article 3(2)(b)(ii).

⁵⁴ Environmental Protocol, Article 3(2)(c)(iv) and (v).

⁵⁵ Environmental Protocol, Article 13(1), (2) and (3).

⁵⁶ Environmental Protocol, Article 17.

⁵⁷ Environmental Protocol, Article 20.

⁵⁸ Environmental Protocol, Article 13(4).

- Compliance by the JARPA II fleet with safety of life at sea requirements as required under applicable international conventions;
- Failure of the JARPA II fleet to provide to Australian and/or New Zealand Search and Rescue Region authorities details on their precise whereabouts within the Southern Ocean so as to facilitate assistance during a maritime emergency;
- Refuelling, resupply and transshipment operations being conducted at sea in the absence of an environmental impact assessment.

Placing the Associated Environmental Impacts of JARPA II on the ATS Agenda

A realistic objective for Australia and New Zealand is to place the associated environmental risks and impacts of JARPA II on the agenda of the ATCM and the CEP in much the same way as tourism has been considered as an issue of maritime safety and environmental protection.

It would be desirable to do this as soon as the 2008/9 austral whaling season comes to an end in March 2009. However, the Canberra Panel acknowledges practical impediments to placing the matter on the agenda of the 2009 ATCM and CEP. Agenda items for the 32nd ATCM and CEP to be held in Baltimore in the United States in April 2009 are now set. We note further that discussion at the 32nd ATCM is likely to be highly compressed as the meeting has been scheduled across Easter, in the United States shortly after a new administration assume office, on the 50th anniversary of the Antarctic Treaty and at the culmination of the 2007-2009 International Polar Year. In light of this it may be more realistic to raise the matter at the 33rd ATCM in 2010, and we note that this timeframe could allow the building of a coalition of likeminded ATCPs willing to support the discussion of the issue.

ATCM

As the agenda at the 32nd ATCM is closed, and as it may be difficult to include JARPA II as a separate item on the 33rd ATCM given current sensitivities, any discussion in the ATCM will likely need to be raised under existing agenda items.

Several agenda items in the ATCM are devoted to technical issues and could be utilized to address JARPA II safety and environmental issues. These include agenda item 9 (Safety and Operations in Antarctica) and agenda item 4 (Operation of the Antarctic Treaty System: Reports by Parties, Observers and Experts), but the discussion under these topics tends to be somewhat perfunctory and is unlikely to address the range of issues implicated by the conduct of JARPA II. More promising is agenda item 5 (Operation of the Antarctic Treaty: General Matters), which will ordinarily see its substantive work conducted through the Legal and Institutional Working Group.

The ordinary means for prompting discussion of a matter in relation to any of these items is via a tabled Information Paper or Working Paper, normally made available electronically in advance of the meeting. An Information Paper could be tabled by any ATCP, Observer or Expert. Hence it would be open to Australia and/or New Zealand to either encourage the tabling of an

Information Paper by an Expert or themselves table a paper that addresses the environmental risks associated with JARPA II in a way that ranges far more broadly than New Zealand's 2007 Information Paper, which was confined to search and rescue coordination in relation to the *Nisshin Maru* incident. We note, however, that Information Papers are not normally translated, and for this reason there is a capacity to object to substantive discussion proceeding (particularly if the Information Paper is tabled by an Expert) without the active support of an ATCP or Working Group Chair, and possibly a request for that paper to be translated. Moreover there has been an emerging practice of discouraging discussion of Information Papers in order to manage workload. Information Papers regarded as contentious may also be subject to efforts to block them informally or formally by invoking the Rules of Procedure. It is open to Australia and/or New Zealand to request the translation of an Information Paper, and thereby remove some of the disadvantages of this format.

An alternative option is for Australia and/or New Zealand to table a Working Paper, which could form a more effective basis for substantive discussion because these are automatically translated into the four official Antarctic Treaty languages. And unlike Information Papers there is a near guarantee that Working Papers may be spoken to, although we acknowledge the possibility even here of discussion being closed down via the Rules of Procedure. Japan can be expected to claim that any Information or Working Paper that made mention of JARPA II is outside the focus of any ATCM Working Group, and this view may attract some sympathy from other ATCPs, particularly if they are parties to the ICRW. This underlines the need for Australia and New Zealand to raise the matter of the associated Antarctic environmental impacts of JARPA II in such a way as to be without prejudice to Japan's claim that it is undertaking special permit whaling under Article VIII of the ICRW.

CEP

The CEP comprises representatives of all parties to the Environmental Protocol. It is an expert body designed to assist in the implementation of the Environmental Protocol and to this end reports to the ATCM on progress towards this objective.

In our view the opportunities for raising JARPA II within CEP directly are limited, given the CEP's focus in its five year work plan on the introduction of non-native species, global pressures (climate change and pollution), marine protected areas, monitoring of the state of the Antarctic environment, the exchange of information and the loss of biodiversity loss. However we do note that the CEP has broad-ranging functions and can be called upon by the ATCM to supply advice on the state of the Antarctic environment and threats to it such as the associated environmental impacts of JARPA II.⁵⁹ Accordingly if these impacts are raised within the ATCM, as is possible and desirable for the reasons given about, it would be open to the ATCM to refer the matter to the CEP for detailed examination having regard to its mandate to promote the protection of the Antarctic ecosystem.

⁵⁹ Environmental Protocol, Article 12(1).

Appendix 1

Synopsis of International Legal Opinions on Japan's 'Scientific Whaling' Program

Rothwell Legal Opinion (2005)

- Completed October 2005 for the International Fund for Animal Welfare
- The opinion outlines legal arguments open to Australia to challenge JARPA II and legal avenues open to Australia before international tribunals/courts
- Copies provided to the former Minister for the Environment and Heritage, the Hon Senator Ian Campbell. Then Shadow Minister for Foreign Affairs Spokesperson for the Australian Labor Party, Mr Kevin Rudd MP, and then Shadow Minister for the Environment, Mr Anthony Albanese MP, were briefed on the findings

Paris Panel Legal Opinion (2006)

- Panel of eminent international lawyers from Australia, France, Mexico, Switzerland, United Kingdom, United States coordinated by Ambassador Alberto Szekely
- Completed May 2006 and released June 2006 during course of St Kitts IWC Meeting
- Provides detailed review of the legal arguments which could be mounted to attack Japan's 'scientific whaling' program under JARPA II

Sydney Panel Legal Opinion (2006)

- Panel of eminent Australian international lawyers headed by Professor Don Rothwell (Australian National University) and comprising Professor Ivan Shearer (Sydney University), Dr Tim Stephens (Sydney University), Dr Natalie Klein (Macquarie University), Associate Professor Greg Rose (Wollongong University) and Dr Chris Ward (Canberra and Sydney Bars)
- Completed December 2006. Distributed confidentially to Australian Government in January 2007.
- Builds on the Paris Panel Report and reviews Australian and New Zealand legal avenues to challenge JARPA II before international courts and tribunals and at other international forums

London Panel Legal Opinion (2007)

- Panel of eminent international lawyers coordinated by Ambassador Alberto Szekely
- Completed and distributed November 2007
- Presents a detailed legal analysis of provisions that might give rise to a cause of action under Part XV of the 1982 UN Convention on the Law of the Sea (UNCLOS) and the legal options for proceedings before the International Court of Justice.
- Concludes that the current and proposed takings of humpback and sei whales, as well as other whale species (minke and fin whales), are for primarily commercial purposes, and thus constitutes a contravention of the provisions of the Convention on the International Trade in Endangered Species of Fauna and Flora and UNCLOS.